STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF

RHODE ISLAND STATE LABOR
RELATIONS BOARD CASE NO: ULP-4891

-AND-

STATE OF RHODE ISLAND
DEPARTMENT OF M.H.R.H.

DECISION AND ORDER

TRAVEL OF CASE

The above entitled matter comes before the Rhode Island State Labor Relations Board (hereinafter Board) on an Unfair Labor Practice Complaint (hereinafter Complaint) issued by the Board against the State of Rhode Island, Department of MHRH (hereinafter State or M.H.R.H.) based upon an Unfair Labor Practice Charge (hereinafter Charge) dated August 16, 1994 and filed on August 7, 1994 by Local 1293, Ladd Center Council 94, AFSCME, AFL-CIO (hereinafter Union).

The Charge alleged as follows:

" Violation of Section 28-7-13 Paragraphs 3, 5, 6, 10

The Department of M.H.R.H. at Ladd Center is violating the above cited paragraphs by requiring Union officials to get notarized slips to investigate information for grievances".

Following the filing of the Charge, an informal conference was held on September 26, 1994 between representatives of the Union and Respondent and an Agent of the Board. When the informal conference failed to resolve the Charge, the Board issued the instant Complaint on February 4, 1997. The Respondent filed an Answer to the Complaint on February 10, 1997 denying the charges outlined in Paragraphs 3 and 4 of the Complaint, and asserting seven affirmative defenses. A formal hearing on this matter was held on April 8, 1997. Upon conclusion of the hearing, both the Union and the Employer submitted briefs. In arriving at the Decision and Order herein, the Board has reviewed and considered the testimony and evidence presented and the Post Hearing Briefs.

POSITION OF THE PARTIES

The Union alleges that in 1994, the State, without negotiating with the Union, unilaterally imposed a requirement for having signatures notarized on all written requests for access to personnel files. The Union states that the State's intention is to inhibit the Union from representing its members in grievances and to disrupt the grievance process. The Union also maintains that the State, through Ms. Claire Schleffer, has admitted that it took this action unilaterally and as such, the Union has established that an unfair labor practice occurred.

The State's position is that the notarization requirement was actually implemented on January 31, 1992. The State enacted the notarization requirement in response to a problem wherein an employee had complained that someone used a faked signature to gain access to his personnel file. 'he State says that it issued a memorandum (hereinafter Schleffler memo) to all the Unions at that point, explaining the new requirement. In response, Local 1293 filed a grievance concerning the notarization requirement; grievance was denied and the State has no record of the matter going to arbitration. In 1994, the Union, under new leadership, filed another grievance on this issue. This too was denied by the State. The State's position is that since the Union knew about the requirement in February of 1992, it cannot file an unfair labor practice charge in August of 1994 In other words, the State alleges that the charge is time-barred. The State also adopts the position that the Union is barred by estoppel, laches, and the failure of the Board to hold a formal hearing on the matter within 60 days of receipt of the charge. State also claims that it has good reason for the policy, that "blanket access" to personnel files is prohibited and the dispute is really one of contract interpretation, not a labor issue subject to the jurisdiction of the Rhode Island State Labor Relations Board.

SUMMARY OF TESTIMONY

The Union presented the testimony of one witness, Mr. Joseph Iadevaia, employed as a Behavior Specialist by the State for 5 years and the Vice President of Local 1293 He testified that he has been involved in processing grievances since 1979. (TR. 1) He has handled approximately ,000 grievances and has made hundreds of written requests for documents in connection with processing those grievances. (TR 13)

He testified that prior to February 1994, he had never been told that there was a requirement for signatures to be notarized when requesting information from a personnel file. (TR18) He also testified that he had never been made aware by any M.H.R.H. official that the State was adding the notarization requirement. (TR 19) He also testified that he personally had never filed a written request to view an entire personnel file and that on most occasions the employee has been with him when the request has been made. (TR 23) Furthermore, he testified that on the occasions when he has reviewed the file without the employee, the employee had not sent a written authorization for him to review the file either ahead of time or with him. (TR 23-24)

On cross examination, Mr. Iadevaia testified that he had no idea whether or not the Union had filed a grievance in 1992 concerning the Schleffer memo. When confronted with the State's exhibit #2 (for ID only), Mr. Iadevaia stated that he did not remember seeing it before. He also testified that it was sometimes very difficult to get notaries for signatures in the Exeter work site. (TR 43) Upon conclusion of Mr. Iadevaia's testimony, the Union rested its case

The State called Maureen Martin, a Union official, as an adverse witness. She identified her own signature on State's exhibit #2 which was the Union's 1992 grievance concerning the notarization requirement

The State's next witness was Claire Schleffer, a Human Resources Coordinator at M.H.R.H. for approximately 38 years She testified that for the 38 years she had been employed by the Department, if an individual wanted to grant access to his personnel file to another person, he would have to submit a note to that effect. (TR 49) She stated that this procedure worked fine until an incident where the Department had accepted a note, purported to be signed by an employee. It turned out that when the employee viewed the signature, he said it was not his signature and was very upset that someone had gained access to his personnel file. (TR 50) It was at that time that she issued the memorandum concerning the notarization requirement. She testified that she personally did not have any discussions concerning this memorandum with any Union officials. (TR 53) Finally, she testified that requests for information from the Union are usually handled by Labor Relations which is not within her division. (TR 53)

On cross examination, she testified that she did not know how records regarding Ladd Center employees were reviewed when the records were housed at Ladd. (TR 54) She also testified that there was no change in federal law which precipitated the writing of the memo. (TR 57) Finally, she testified that the requirement for notarization was not negotiated with Local 1293. (TR 59) On re-direct examination, Ms. Schleffer testified that the notarization requirement was in effect prior to the Collective Bargaining Agreement of June 1992 (Joint exhibit #1).

The State's next witness was Stephen Volante, a Labor Relations Officer with the Department of M.H.R.H. He serves as a mediator and hearing officer for grievances between the unions and management and works in a separate division from Claire Schleffer. (TR 63-64) He testified that the normal practice for Unions when they are seeking information is to submit a written request. (TR 64)

The State's final witness was Richard Esposito, a Supervising Employee Relations Officer who was "second in command" to Claire Schleffer in managing the daily operations of the Personnel Employee Relations Office. (TR 71) He testified that after the Schleffer memo was issued in 1992, he believes that he spoke with union officials of Local 1293 concerning the memorandum.

DISCUSSION

There is no factual dispute that the notarization requirement was enacted without prior consultation with the Union. The issue in this case is whether or not the imposition of this new notarization requirement, without first negotiating with the Union, is an unfair labor practice. In order to make this determination, the Board first must determine whether or not this is a mandatory subject for bargaining. If not, then the State has committed no wrong in failing to negotiate prior to implementing the notarization policy.

"In order to fulfill the duty to bargain, it is necessary to provide information relevant and reasonably necessary to administer the collective bargaining agreement. Thus, information related to grievances must be disclosed. In addition, the procedures used to resolve grievances under the collective bargaining agreement are mandatory subjects that must be negotiated. Accordingly, the form in which grievances are submitted, the time limits within which they are submitted, plant access of union officials

to handle grievances, the procedures for selecting arbitrators are all matters that must be negotiated". 8.04(5) NLRA: Law & Practice 8-32.

In this case, during the investigation of a grievance, a Union official, Mr. Iadevaia, asked to review a personnel file and was refused by the State because the Union official did not have a written, notarized authorization in his possession from the employee whose file he wished to review. Prior to this incident, Mr. Iadevaia testified that he had never filed a written request to review a personnel file, much less a notarized request. Ultimately, Mr. Iadevaia did obtain a written notarized slip from the employee in question and was able to review the file. The State's witness, Claire Schleffer candidly testified that she enacted the notarization requirement because of a problem with a forged signature on a written request, but that she did not negotiate or discuss the requirement with any Union officials. The Schleffer memo stated:

> "We are adding a requirement for the notarization of signatures on the applicable union forms, specifically in situations where-by employees request a third party union representative to review their personnel file's (sic) for them without the employees' actual presence at the time of review. This will help to ensure confidentiality of employee documents and reduce the possibility of assertions that confidentiality has been breached".

Article 25 of the parties Collective Bargaining Agreement (CBA) outlines the grievance procedure. Section 25.2 (e) states in pertinent part: "The State, on request, will produce payroll and other records, as necessary". Mr. Iadevaia testified, without contradiction, his practice of gaining access to personnel files for grievance investigation. Ms. Scheffler testified that in spite of Mr. Iadevaia's luck in gaining such access, the State had a policy for at least 38 years that written authorization was required for third parties to gain access to personnel files. In 1991, she issued a policy which stated that "we are adding a requirement for the notarization of signatures". Even if the State had good policy reasons for wanting to restrict access, it cannot just unilaterally change the terms and conditions of access without first negotiating because such was a mandatory subject for bargaining. The employer has freely admitted to having implemented a new requirement for access to personnel files which is applicable to Union representatives when they are investigating personnel files for grievance related matters. Furthermore, the Employer freely admitted to having undertaken such action without prior discussion with

the Union and maintains that determining the method of access to files is strictly a management function and therefore is not a bargainable subject. As discussed above, access to records by the Union is governed by the grievance procedure and is a mandatory subject for bargaining. The State's failure to consult the Union prior to adding the requirement of notarization of signatures for access to personnel records by union officials investigating grievances is an unfair labor practice.

The State has raised a host of defenses to divest itself the unfair labor practice charge, some of which merit further discussion. The State first claims that the Union should be time barred from filing the unfair labor practice charge because the complaint was not made within a six month period from the time the new policy was promulgated by Ms. Schleffer. The State urges a finding that since the State Labor Relations Act is silent on this issue, the Board must follow the federal precedent of limiting the filing period to six months. While the Board notes that there is no written statute or administrative regulation which limits its authority to hear cases, the Board also notes that in this particular case, the issue of timeliness of the complaint was not raised by the Employer until its post-hearing brief. At no point, either prior to or during the formal hearing, did the Employer file or even orally make a motion to dismiss the complaint on these grounds. Article IV, Section 34 of the General Rule and Regulations of the State Labor Relations Board states:

> All motions made at or during the pendency of a hearing, except motions hereinafter specifically required at all times to be made to the Board, shall be stated orally, shall be included in the stenographic report of the hearing, and shall be decided by the Board..."

Section 35 of the regulations governs motions made before or after hearings. Section 36 states:

> Waiver or Objections: Any objection not duly urged before the Board shall be deemed waived, unless the failure or neglect to urge such objections shall be excused by the Board because of extraordinary circumstances..."

The Board holds that written argument in a post hearing brief is not the same thing as having raised an objection or having made a motion (either oral or written) during the hearing process. Therefore, the Board finds that as a matter of practice and procedure, the State's failure to make this objection known by motion, either before,

during or after the formal hearing, constitutes a waiver of its right to raise this question at all.

The State also urges this Board to refrain from exercising its jurisdiction because a contract violation was also alleged and litigated by the Union pursuant to the grievance procedure under the contract. This Board has stated in many decisions in the past and continues to so hold that a particular set of facts may give rise to both a contract violation and a violation under the Rhode Island State Labor Relations Act. This Board is clearly without jurisdiction to hear an allegation of contract violation. However, either an Employer or a Union may choose to pursue remedies in two different forums for two different complaints arising under the same set of facts. This Board will not decline its jurisdiction to hear an alleged violation of the Labor Relations Act, just because a party has alleged a cause of action in a different forum.

The State has also urged the Board to find that the Union cannot proceed with its complaint on the grounds of estoppel and laches. The State argues that the Union waived its right to bargain over any subject not included in the contract because the contract contained a so- called "zipper clause". The Board is puzzled by *this* argument in light of the State's previous argument that the issue being litigated is one of <u>contract interpretation</u>. The Board is satisfied that the issue of the State's duty to supply records is clearly addressed in Article 25.2 (e) , discussed infra, and that the State unilaterally added a requirement which impinges upon the grievance procedure.

In addition, there was facially conflicting evidence presented on the issue of how the records (ie- personnel records) had been supplied in the past On the one hand, Ms. Schleffer, a long time State employee with nearly 40 years of service, testified that for as long as she had worked for the State, there had been a regulation requiring employees to provide written authorization in order to gain access to their own files or to grant access to others to review those files. The Board finds Ms. Schleffer's testimony credible and has no reason to discredit or disbelieve her testimony that such a regulation had indeed been on the books. In addition, the Board also notes that Ms. Schleffer did not have

[1] The State also argues at P. 13-14 of its brief that there is a dispute among the parties as to <u>what</u> records must be produced. That issue was not before this Board. The sole issue before this Board is whether or not the State's action in unilaterally creating a notarization requirement for written consent slips for personnel file access by union representatives is an unfair labor practice.

personal knowledge on how the personnel records were managed when they were housed at the Ladd Center Facility in Exeter. [2] However, on the other hand, the Board was also presented with testimony from Union witness Joseph Iadevaia. The Board also finds Mr. Iadevaia's testimony credible wherein he testified that he personally had never filed a written request to view an entire personnel file. The Board does recognize that Mr. Iadevaia also testified that on most occasions the employee has been with him when the request has been made. (TR 23) He also testified that on the occasions when he has reviewed the file without the employee, the employee had not sent ahead a written authorization or sent one with him. The Board believes that the testimony of both witnesses was truthful and can be harmonized. It does not strike the Board as unusual that an employer would have a regulation on its books, but be practicing a different procedure for the issue being regulated. In fact, this Board would say that this tends to be a fairly common practice and just as commonly tends to create havoc when either the actual practice or the policy itself gets changed. In addition, when there are many divisions of a department, it does not strike the Board as unlikely that some divisions may not be following the regulation the same way as all the others, particularly if that division is physically separated by geography.

None of the defenses raised by the State are sufficient to defend itself against its own admission that it unilaterally changed the terms under which personnel records are supplied to Union officials for grievance investigations. Therefore, this Board finds that the State's failure to bargain over changes to a mandatory subject for bargaining is in violation of R.I.G.L. 28-7-13 (6).

FINDINGS OF FACT

1 The State is an "employer" within the meaning of the Rhode Island State Labor Relations Act.

2) The Union is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers in grievances

[2] At the time of the formal hearing, the records were apparently centralized at one location for all the divisions of M.H.R.H.

or other mutual aid or protection and as such is a labor organization within the meaning of the Rhode Island Labor Relations Act.

3) On or about January 31, 1992, the State issued a memorandum, adding a requirement for the notarization of signatures on the applicable union forms, specifically in situations whereby employees request a third party union representative to review their personnel files for them without the employees' actual presence at the time of review.

4) The January 31, 1992 memorandum was issued without prior consultation, negotiation or bargaining with the Union.

5) Prior to the January 31, 1992 memorandum, the State did have a policy that required written authorizations for access to personnel files.

6) Prior to February 1994 Union official, Joseph Iadevaia was able to review personnel records without written authorizations from the affected employees.

7) On many occasions, but not all, Mr. Iadevaia was accompanied by the affected employee when reviewing the personnel records.

8) In February 1994, Mr. Iadevaia sought and was denied access to the personnel file of Thomas Bloschichak because he did not have the written and notarized consent from Mr. Bloschichak. When Mr. Iadevaia produced a notarized, written consent from Mr. Bloschichak, Mr. Iadevaia was granted access to the file.

CONCLUSIONS OF LAW

1) The Employer failed to file a motion to dismiss on the record or to object on the record that the Union's complaint should be time barred and thus the Employer's complaint on this issue is foreclosed pursuant to Rules 34, 35 and 36 of the Rules and Regulations of the Rhode Island State Labor Relations Board.

2) The Union has proven by a fair preponderance of the credible evidence that the State has committed a violation of R.I.G.L. 28-7-13 (6).

3) The Union has not proven by a fair preponderance of the credible evidence that the State has committed a violation of R.I.G.L. 28-7-13 (3) (5) or (10).

ORDER

1) The Employer is hereby ordered to cease and desist from requiring a notarized signature on written employee authorizations for access to personnel records.

2) The Employer is hereby ordered to negotiate with the Union before implementing any changes relative to the Union's access to personnel records.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Gina A. Vigliotti, Chairperson, Dissent

Frank J. Montanaro, Member

Joseph V. Mulvey, Member

Gerald S. Goldstein, Member

Ellen L. Jordan, Member, Dissent

Paul E. Martineau, Member

Joseph Virgillo, Member

Entered as an Order of the
Rhode Island State Labor Relations Board

Dated: December 22, 1997

By: Donna M. Geoffroy
Donna M. Geoffroy, Administrator